JOHN JAY

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Case and Comment

NOTES OF

RECENT IMPORTANT, INTERESTING DECISIONS

INDEX TO ANNOTATION OF THE LAWYERS' REPORTS, ANNOTATED

LEGAL NEWS NOTES AND FACETIÆ

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CASE AND COMMENT

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John Jay.

The first Chief Justice of the Supreme Court of the United States holds a high place among American jurists and statesmen. Though his judicial career was brief, it gave proof of the excellence of its judicial quality, while he ranks high among the Revolutionary patriots as diplomat and statesman.

John Jay was born in New York city December 12, 1745. His ancestors were French Huguenots and Dutch. In his later years, when violently attacked for concessions to England, he pointed out the fact that there was not a drop of English blood in his veins. He was educated at King's College, now Columbia. He studied law for four years, and was admitted to the bar in 1768, when he became a partner of Livingston, afterwards chancellor of the state. In 1774 he was married.

The stirring events that preceded the Revolution brought Jay, then only about thirty years of age, to the front as a leader. He was a member of the First Continental Congress, and as one of a committee for the purpose he wrote the "Address to the People of Great Britain," which Thomas Jefferson, without knowing the authorship, declared to be a production of the finest pen in America. Called, in 1776, to assist in forming the government of New York, his absence prevented him from signing his name to the Declaration of Independence; but he made a report in its favor in the New York Convention. In 1777 he was appointed Chief Justice of the Supreme Court of New York, and served until 1779. In that year he was appointed Minister Plenipotentiary to Spain, and was afterwards one of the commissioners to negotiate peace with Great Britain. His services on this commission were of extraordinary value. He refused to treat with the English commission, whose authority was to treat with "colonies." On this point he and Franklin disagreed, but the result was a triumph for Jay, as the treaty finally obtained was with the "United States," and was more favorable to this country than the most sanguine had expected. When he returned home, the following year, Adams, a fellow commissioner, wrote that he came loaded with honor. He was at once made Secretary of Foreign Affairs, which was then the most important position in the government. In 1786 he drew up a report on the "Relations of the United States and Great Britain," and, among his other activities, joined Hamilton and Adams in editing "The Federalist." In 1789 Washington offered him his choice of positions in the government under the new Constitution, and he chose that of Chief Justice. He sat in the court about five years, and then resigned. In 1794 he was made Minister Plenipotentiary to Great Britain. At London he concluded the treaty which bears his name, by which he agreed to the principle that "the flag does not carry the cargo." A storm of unpopularity met him on his return. In 1795 he was elected governor of New York, and served

by re-election until 1801. Then he was given the unique honor by President Adams, of a second appointment as Chief Justice of the United States, and the appointment was confirmed, but he declined to accept. At the age of fifty six his public career was ended. For twenty-eight years afterward he resided on his estate at Bedford, Westchester county, engaged only with his private affairs and with religious and charitable duties. His last official position was that of President of the American Bible Society.

In the practice of law Jay spent but six years. On the bench he sat about seven years, of which two were spent in the New York Supreme Court. He wrote but few judicial opinions, but these show his ability. The most notable is that in the case of *Chisholm* v. *Georgia*, 2 Dall. 419, 1 L. ed. 440, in which he upheld the right of a citizen to sue a state in the Supreme Court of the United States. But the decision was soon superseded by the Eleventh Constitutional Amendment.

In his personal characteristics Jay was a gentleman, both in manners and character. In appearance he was tall and slender, with blue eyes, Roman nose, and hair worn in a powdered queue. His temper, though said to be naturally irritable, was completely under control. He was unaffectedly modest, free from ostentation, strictly economical without parsimony, but liberal to all religious and charitable objects. He had a deep sense of responsibility to duty, and strong religious convictions. As someone has said of him, "No myths have grown around John Jay. He lives in our memories a faultless statue, whose noble lineaments have everything to gain from the clear light of history." In the famous words of Webster: "When the spotless ermine of the judicial robe fell on John Jay it touched nothing less spotless than itself."

A Crime to Relieve Suffering.

One of those blunderbuss laws that bring legislators into contempt was passed, as an Indiana correspondent writes, by the last legislature of that state. It is similar to the vicious bill that the doctors recently tried, without success, to push through the New York legislature. It makes it unlawful for any but licensed doctors "to heal, cure, or relieve, or to attempt to heal, cure, or relieve those suffering from injury or deformity or disease of mind or body." When a legislature makes it a crime "to heal, cure, or relieve . . . those suffering," the statesmen who have enacted the law may reasonably feel that they have done enough for one session.

A Parent's Risks in Louisiana.

Several attorneys in Louisiana have written to explain that the novel doctrine discussed in the February CASE AND COMMENT, under the heading "A Parent's Risks," is a part of the established law in Louisiana. The Code of that state, article 2318, declares that "the father, or, after his decease, the mother, is responsible for the damage occasioned by their minor or unemancipated children residing with them or placed by them under the care of other persons, reserving to them recourse against those persons." The case of Mullins *v.* Blaise, 37 La. Ann. 92, applies this statute, and sustains a cause of action against a parent for damage done by a child six years old, while celebrating Christmas, by firing a Roman candle into the street, and hitting another child in the eye. The court refers to the Code Napoleon, article 1384, and points out that the only difference between the Louisiana law and that of France is that under the latter the parent is liable only in case he fails to prove that he could not have prevented the act which caused the damage, whereas the Louisiana law does not so limit his liability. One of our Louisiana correspondents says of the English decision referred to in the February article: "This evidently is another step in the progress of the common law towards the excellence of the civil law."

Questions for Jury on Undisputed Facts.

There is a necessary conflict between two statements frequently made by the courts. One is that a question presented on undisputed facts is for the court. The other is that certain questions—such as negligence and reasonableness—are for the jury when reasonable men might differ in their judgment upon them. The conflict arises when the facts, though undisputed, present a question of this kind on which reasonable minds might differ. In one of the leading works on the subject it is said, respecting negligence, that "in the view of some of the courts it is a question for the court where there is no conflict as to the

evidence." Thompson on Trials, § 1663, citing a large number of cases. But the author emphatically states as the better opinion that, "whether the facts are disputed or undisputed, if different minds might honestly draw different conclusions from them, the case should properly be left to the jury." There can be no doubt that this, which he calls the better opinion, is now declared by a great majority of the authorities. Indeed, the cases which declare in broad terms that the question of negligence is for the court when the facts are undisputed are, for the most part at least, cases in which there was not room for different conclusions to be reasonably drawn. In such cases the court rightly decided the question as a matter of law, but erred in stating the rule so broadly as to cover cases in which reasonable minds might reach different conclusions. Though there may be cases in which the courts have held that these doubtful inferences are to be determined as a matter of law when the facts are undisputed, the weight of authority to the contrary is overwhelming. The apparent conflict between the two rules on this subject is chiefly one of language, and not of decision. It would mostly disappear if the courts were more careful, when stating the rule on this subject, to state it accurately.

Function of the Jury in Mixed Questions of Law and Fact.

It is customary to say that questions of a certain class, like negligence, are mixed questions of law and fact for the jury to decide. There is something unsatisfactory in this statement. Why the jury should decide questions of law in one matter, and not in another, is not explained. There is indeed a reason why the jury should be left to pass upon a question of negligence about which men might reasonably differ, but this reason is not that they ought to be allowed to decide the law of this subject any more than the law of any other subject. Strictly speaking, questions of law in civil cases are always for the court, and the so-called mixed questions of law and fact do not present any exception. In these matters there is a confusion of thought as to what the true functions of the jury are. The reason that the jury is said to determine mixed law and fact is that the ultimate question of fact which the jury has to decide is not usually mentioned, and, when that is answered, the question of law is settled as a necessary consequence. What constitutes negligence in the abstract is clearly a question of law. Whether conduct of a particular kind in a certain state of circumstances constitutes negligence, or not, is usually a question for the jury. Yet the function of the jury is in reality confined to determining the facts. When the procedure is carefully analyzed it will be found that the court determines the law by defining what negligence is; as, for instance, by declaring that it is a failure to do what an ordinarily prudent man would do under the circumstances. It is then the function of the jury to determine, first, what the man in question did do, and, second, whether his conduct was such as a reasonable man would display under the circumstances. What the man did do, is determined by testimony of witnesses. What a reasonable man would do under like circumstances is not proved by witnesses, but is to be determined by the jury as a matter of which they take judicial notice. This is as undeniably a matter of fact as is the question of what was actually done. It is therefore, like other facts, to be determined by the jury. But, unlike ordinary facts, it must be determined without testimony, in the light of their own knowledge and experience. When that question is determined, all that remains to be done is to apply a clear rule of law to the established facts, on which the law permits but one decision. Theoretically the proper charge to the jury in such cases would not tell them to decide the question as one of mixed law and fact, but would give them a statement of what constitutes negligence in law,—as, for instance, a failure to do what a reasonably prudent man would do, etc.,—and then tell them that, if they find the party has not done what a reasonably prudent man would do, he must as a matter of law be held negligent, but that, if he has done all that a reasonably prudent man would do, etc., then as a matter of law he was not negligent. If the ordinary practice of calling this a mixed question of law and fact does not lead to any injustice, it is at least confusing. It leaves the real nature of the question, and the true functions of the jury in deciding it, unexplained. In truth it is the court, and not the question, that is "mixed" when this statement is made.

There can be no dispute about the real nature of any of the three elements above stated, that have to be determined in a case of negligence. That the rule or definition of negligence is for the court is certain. That the

acts done are questions of fact for the jury is equally undisputed. The other question, as to what ordinarily prudent men would do in such a case, though usually left unexpressed, is quite as clearly a question of fact. As the court says in Lillibridge v. McCann (Mich.) 41 L. R. A. 381, when discussing a matter of negligence: "It was competent for the jury to draw such inference from the proved facts as common knowledge would suggest." When that inference is drawn, and not till then, the facts are established. When that is done, nothing remains but a question of law. Failure to distinguish them, and treating them as mixed questions of law and fact, makes a mere muddle of things that are distinct.

Judgments Both Void and Valid.

Mr. Justice Field, in his opinion in Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565, took occasion to reprobate the tendency manifested by many of the early cases impliedly to concede the validity, within the state where rendered, of a judgment *in personam* entered against a nonresident who was served constructively only, and did not appear; while denying its validity in other states of the Union, upon the ground that constructive service of process is insufficient to confer jurisdiction to render a judgment *in personam*. He says: "If the court has no jurisdiction over the person of the defendant by reason of his nonresidence, and consequently no authority to pass upon his personal rights and obligations; if the whole proceeding, without service upon him or his appearance, is *coram non judice* and void; if to hold a defendant bound by such a judgment is contrary to the first principles of justice,—it is difficult to see how the judgment can legitimately have any force within the state."

This tendency has been singularly persistent, and, in a slightly different form, has reappeared in the very court which uttered the criticism. Thus, Chief Justice Fuller, in his opinion in Grover v. Radcliffe, 137 U. S. 287, 34 L. ed. 670, while denying the validity in Maryland of a personal judgment rendered in Pennsylvania against a nonresident of that state, upon the ground that he had not been brought within the jurisdiction of the Pennsylvania court by service of process or voluntary appearance, and had not in any manner authorized the proceedings in which the judgment was rendered, yet gives color, by his apparent approval of language used in cases cited by him, as well as by expressions of his own, to the view that the judgment might be perfectly valid in Pennsylvania; and upon the authority of this opinion it is expressly stated in Du Pont v. Abel, 81 Fed. Rep. 534, that a personal judgment rendered against a nonresident who was not personally served within the state, and who did not appear, may be perfectly valid in the state where rendered, but cannot be enforced or made the foundation of an action in another state.

Justice Field's criticism is, of course, directed against the concession of the validity of the judgment in the state where rendered, and not against the denial of its validity elsewhere.

The position criticised seems so obviously illogical that it is somewhat remarkable that there should have been any occasion for the criticism, and still more remarkable that the court for which Justice Field spoke should have furnished an occasion for its repetition.

The courts which refuse to recognize or enforce a personal judgment rendered in another state against a nonresident without service of process, or upon constructive service, hold there was no jurisdiction to render such judgment, and they avoid the effect of the provision of the Federal Constitution and Act of Congress requiring each state to give full faith and credit to the judicial proceedings of every other state, upon the ground that these provisions do not apply to a judgment rendered without jurisdiction. But the concession that the judgment is valid in the state where rendered is fatal to the position that it was rendered without jurisdiction. It is essential to the validity of the judgment, either in the state where rendered or elsewhere, that the requirements of due process of law shall have been observed, and due process of law requires some mode of service that will confer jurisdiction. (Pennoyer v. Neff.)

Before the adoption of the constitutional provision as to due process of law by the Fourteenth Amendment, in the absence of any similar provision in the state constitution, there was nothing to prevent a state legislature from dispensing entirely with service of process, or from making any mode of service that it might see fit sufficient to confer jurisdiction to render a personal judgment. Under such conditions, it is possible that a judgment might be valid in the state where rendered, and yet not meet the test of jurisdiction to be applied when its recognition or enforcement in another state was concerned. But the adoption of that provision deprived the state legislatures of their power

arbitrarily to prescribe what shall be sufficient to confer jurisdiction. Henceforth, a violation of the principles of natural justice in the rendition of a judgment which will justify the courts of another state in refusing to recognize or enforce it, notwithstanding the constitutional provision as to "full faith and credit," also condemns it in the state where rendered.

The concession made in some of the cases, when closely examined, will be found to be narrower and more guarded, being rather a concession that the courts of the state in which the judgment was rendered might uphold its validity, rather than a concession of its validity when subjected to the test of correct principles of law. Thus, Justice Gray, in Hart v. Sansom, 110 U. S. 151, 28 L. ed. 101, says, with reference to a judgment *in personam* rendered against a nonresident upon constructive service: "The courts of the state [in which the judgment was rendered] might perhaps feel bound to give effect to the service made as directed by its statutes, but no court deriving its authority from another government will recognize a merely constructive service as bringing the person within the jurisdiction of the court."

The practical evil of the concession in its broader form consists in the indirect authority which it furnishes for upholding, in the state where rendered, a judgment rendered upon a service of process which conforms to the statutes of that state, but which nevertheless fails to meet the test of jurisdiction to be applied when the enforcement of the judgment in another state is concerned. In other words, it gives color to the view that a different jurisdictional test is to be applied when it is sought to have the judgment recognized or enforced in another state, than when the question of its validity in the state where rendered is concerned. The extent to which this view, that seems so illogical, has prevailed, is illustrated by the opinion expressed by the learned annotator in a note to De La Montanya v. De La Montanya, 53 Am. St. Rep. 179, to the effect that prior to the decision in Pennoyer v. Neff "a majority of all persons giving attention to the law understood that every state or country had power to provide the mode in which the process of its courts might be served, and, further, that each had authority, irrespective of the place of residence of the defendant, to assume jurisdiction after such service of process had been made as prescribed by its laws, and to render a judgment which should be entitled to respect within the jurisdiction wherein it was rendered, though beyond that jurisdiction it might be deemed a nullity."

A reference to the cases cited in the note to Pinney v. Provident Loan & Inv. Co. 50 L. R. A. 577, seems to justify the statement, at least so far as it applies to the understanding of the law on the part of the courts. But those who consider the requirements of due process of law must logically admit the invalidity of the judgment in the state where rendered, or else affirm its validity in other states. The adoption of either alternative would preserve logical consistency; but, in the light of the decisions as to due process, the latter alternative is inadmissible.

If the court had no jurisdiction, the judgment cannot be valid anywhere. If the court had jurisdiction, the constitutional provision as to full faith and credit gives the judgment the same validity in other states as it has in the state where it was rendered. There seems to be no escape from this conclusion, and it is remarkable that it has been so often ignored.

Index to Notes

IN

LAWYERS' REPORTS, ANNOTATED.

Book 50, Parts 5 and 6.

Mentioning only complete notes therein contained, without including mere reference notes to earlier annotations.

Among the New Decisions.

Bankruptcy.

The payment of money by an insolvent to an unsecured creditor in the ordinary course of business is held, in *Re* Fixen & Co. (C. C. A. 9th C.) 50 L. R. A. 605, to be a transfer of property within the meaning of the bankruptcy act of 1898, § 60*a*, making transfers of property by an insolvent for the purpose of enabling one creditor to get an advantage over the others an illegal preference; and a creditor who has received such payment is required to surrender it before he can claim for the balance of his account.

Bills and Notes.

A purchaser of a draft with bill of lading attached is held, in Tolerton *v.* Anglo-California Bank (Iowa) 50 L. R. A. 777, rejecting the doctrine of Finch *v.* Gregg (N. C.) 49 L. R. A. 679, to be unaffected by a warranty made by his assignor on sale of the goods represented by the bill of lading.

Carriers.

Conditions indorsed on an employee's pass, by which he assumes the risks from negligence of the carrier or otherwise, are held, in Whitney *v.* New York, N. H. & H. R. Co. (C. C. A. 1st C.) 50 L. R. A. 615, to be invalid on grounds of public policy, where he is traveling for his own convenience, not going to or from work, and the pass is one of the considerations of his employment.

A rule of a street-railway company requiring all colored passengers to occupy front seats, and white passengers the back seats, is held, in Bowie *v.* Birmingham R. & E. Co. (Ala.) 50 L. R. A. 632, to be a reasonable regulation.

The liability of a carrier of passengers is considered in the case of Central of Georgia R. Co. *v.* Lippman (Ga.) 50 L. R. A. 673, where the measure is declared to be that of extraordinary diligence, not only with respect to passengers on ordinary passenger trains, but also with respect to those on freight trains, though in determining this diligence the peculiar conditions and incidents of travel on freight trains are taken into consideration.

An exclusive privilege given by a railroad company to one baggage-transfer company for entering a railroad depot to solicit business, without any interference with the right of a rival company to receive and deliver baggage at the station, is upheld in Norfolk & W. R. Co. *v.* Old Dominion Baggage Transfer Co. (Va.) 50 L. R. A. 722, under a statute adopted from the English railway and canal traffic act of 1854, prohibiting unreasonable or undue preferences or advantages by carriers, since this provision is held to apply only to prefer-

ences in respect to their service as common carriers.

Certiorari.

A remedy by appeal or writ of error was held insufficient to bar certiorari, in State *ex rel.* Hamilton *v.* Guinotte (Mo.) 50 L. R. A. 787, unless the appeal or writ of error was adequate to meet the necessities of the case. On the other hand, it is decided in State *ex rel.* Kansas & Texas Coal Co. *v.* Shelton (Mo.) 50 L. R. A. 798, that a certiorari would not lie to quash a judgment denying the right to condemn property in eminent domain proceedings for errors which could be corrected by appeal or writ of error, although the latter remedies were inadequate because too slow.

Commerce.

A law imposing a tax upon emigrant agents who hire laborers in the state to be employed outside the state is held, in Williams *v.* Fears (Ga.) 50 L. R. A. 685, not to constitute a regulation of interstate commerce.

Conflict of Laws.

A claim for damages *ex delicto* arising from a tort or trespass upon the person of a married woman temporarily in the state, but whose domicil is in another state, is held, in Williams *v.* Pope Mfg. Co. (La.) 50 L. R. A. 816, not to be the wife's property acquired in the state where the tort occurred, within the meaning of the community statute of that state; but where the wife by the law of her domicil has capacity to sue in her own name for such a tort, she is allowed to do so at the place of the injury.

Constitutional Law.

A statute authorizing service of summons on corporations which neglect to file names of officers on whom process may be served, to be made by leaving copies with the register of deeds where the corporation has its principal office, is held, in Pinney *v.* Providence Loan & Inv. Co. (Wis.) 50 L. R. A. 577, to be invalid for lack of due process of law.

A statute requiring labels to be affixed on all baking powders, showing the ingredients, is held, in State *v.* Sherod (Minn.) 50 L. R. A. 660, to be a valid exercise of the police power.

A statute which makes it unlawful to make options for the sale of commodities of those kinds which have been the subject of gambling operations is held, in Booth *v.* People (Ill.) 50 L. R. A. 762, not to violate the constitutional provisions against deprivation of property without due process of law.

Contempt.

The power to punish contempts, being inherent in every court of record, is held, in Bradley *v.* State *ex rel.* Hill (Ga.) 50 L. R. A. 691, not to be subject to restrictions or limitations by the legislature; and the fact that an act is punishable as a crime is held insufficient to prevent its punishment as a contempt of court.

Contracts.

The destruction by fire of the business house and stock of goods of a firm which is subsequently dissolved and retires from business is held, in Madden *v.* Jacobs (La.) 50 L. R. A. 827, not sufficient to terminate the employment of a clerk under contract for a year, or to relieve the members of the firm from liability to pay his salary for the rest of the term.

Corporations.

The execution of an appeal bond by a brewing company for the benefit of one of its customers, although it may give the company some incidental advantage, is held, in Best Brewing Co. *v.* Klassen (Ill.) 50 L. R. A. 765, to be *ultra vires* and void because not within the express or implied powers of the corporation.

Courts.

Law reports distributed to and received by the county judges throughout the state by virtue of a statute are held, in Clifford *v.* Hall County (Neb.) 50 L. R. A. 733, to belong to the office, and not to the individual judges, and therefore the right to their possession and custody passes from an outgoing to an incoming judge.

Cuba.

The Island of Cuba is held by the Supreme Court of the United States, in Neely *v.* Henkel, U. S. Advance Sheets, p. 302, to be for

eign territory within the meaning of the act of Congress providing for extradition of persons violating the laws of foreign territory occupied by or under the control of the United States, notwithstanding the fact that the island is under a military government appointed by and representing the President of the United States, who is engaged in the work of assisting the inhabitants of the island to establish a government of their own.

Damages.

The loss sustained by a woman on account of breaking her engagement to marry, at the solicitation of another man, and on his promise to marry her, is held, in Hahn *v.* Bettingen (Minn.) 50 L. R. A. 669, not to be a proper element of damages in an action against him for breach of promise, since she cannot take advantage of her own wrong.

The measure of a carrier's liability for failure promptly to deliver goods which had been received with knowledge of the shipper's contract to deliver them on a specified date or incur a forfeiture is held, in Illinois Central R. Co. *v.* Southern Seating & Cabinet Co. (Tenn.) 50 L. R. A. 729, to be the loss sustained by the shipper under the penalty clause of his contract.

Death.

A voluntary settlement by an injured person with the party causing the injury is held, in Southern Bell Teleph. & Teleg. Co. *v.* Cassin (Ga.) 50 L. R. A. 694, to preclude an action for his death by his wife or child under a statute giving a remedy for the homicide of a husband or father.

Domicil.

The domicil of a child after divorce, on which the custody has been given to the mother, is held, in Fox *v.* Hicks (Minn.) 50 L. R. A. 663, to follow the domicil of the mother.

Eminent Domain.

The owner of property abutting on a city street, near a street-railway turntable, is held, in Louisville R. Co. *v.* Foster (Ky.) 50 L. R. A. 813, to have no right to compensation for injury to his property by the street-railway turntable and the noises, smells, and disturbances reasonably incidental to the operation of the street railway and borne by the public generally, but is allowed to recover for any substantial injury caused by such noises, smells, and disturbances as are not fairly incidental to the operation of such railway, or borne by the property owners generally along the line.

Evidence.

The presumption of negligence on the part of a railroad company in case property is set on fire by sparks from a locomotive is held, in Louisville & N. R. Co. *v.* Marbury Lumber Co. (Ala.) 50 L. R. A. 620, insufficient to make a conflict of evidence which will take the case to the jury, where there is undisputed proof of due care in the construction and operation of the locomotive, although the setting of the fire creates a prima facie presumption against the company.

Fixtures.

Wagon scales set upon a foundation of stone and mortar, within which the platform is hung and from which supporting rods extend through the wall under a building, through its floor, to the beam on the inside, where the weight is ascertained, are held, in Thompson *v.* Smith (Iowa) 50 L. R. A. 780, to be fixtures, when they are set up for the express purpose of the business, and everything indicates that they are intended to remain permanently where located.

Gaming.

A private room in a hotel, rented by the occupant, is held, in Greenville *v.* Kemmis (S. C.) 50 L. R. A. 725, to be his "place" or his "house," within the meaning of an ordinance making it unlawful to permit gaming in any person's inclosure, place, or house.

Highways.

The duty of a railway company under a contract with a city to keep its tracks in a suitable and safe condition for those who pass over the streets is held, in Kansas City *v.* Orr (Kan.) 50 L. R. A. 783, not to relieve the city from its duty to the public to keep its streets in reasonably safe condition, nor to relieve it from liability for the consequences of its negligence in that respect.

Husband and Wife.

An action by a wife against one who entices her husband from her and alienates his affections is held, in Dietzman *v.* Mullin (Ky.) 50 L. R. A. 808, to be authorized by a statute which gives a wife the right to sue and be sued as a single woman.

Imitations.

The false designation of washboards as aluminum when the metal used on them is zinc is held, in American Washboard Co. *v.* Saginaw Mfg. Co. (C. C. A. 6th C.) 50 L. R. A. 609, not to constitute an unlawful competition against a manufacturer of aluminum washboards, who, by virtue of a monopoly in the supply of that metal, is the only one who does or can furnish such articles, when there is no attempt to represent that the zinc boards are of his manufacture.

Injunctions.

A bill for an injunction against the discharge of sewage from Chicago, by artificial means and through an unnatural channel, into the Mississippi river, to the damage of the inhabitants of the state of Missouri, is held, in Missouri *v.* Illinois, U. S. Advance Sheets, p. 331, to be within the original jurisdiction of the Supreme Court of the United States as a controversy between states.

Insolvency.

An action by a trustee in insolvency, under a state insolvency law, to set aside a fraudulent conveyance of goods by the insolvent after the Federal bankruptcy act took effect, is held, in Ketcham *v.* McNamara (Conn.) 50 L. R. A. 641, to be precluded by the bankruptcy law, although the insolvent has not been declared a bankrupt.

Insurance.

A provision in an insurance policy, that it shall be incontestable for any cause other than misstatement of age, "except as hereinbefore provided," is held, in Welch *v.* Union Central L. Ins. Co. (Iowa) 50 L. R. A. 774, not sufficient to preclude the insurer from relying on the warranties contained in the application, which is a part of the contract and the statements in which are made the basis of the policy, since the omission of fraud from the specified grounds of contest will not preclude contest on that ground.

An insured who destroys the insurer's right of subrogation against third persons for the loss of insured fixtures, by consenting to exclude any claim for them from the jury in an action against the third party for damages, is held, in Peckham *v.* German Fire Ins. Co. (Md.) 50 L. R. A. 828, to be thereby deprived of any right of action against the insurer on account of the fixtures, where the policy requires the assured to assign his claim against the third party, or prosecute it for the insurer.

A deed of insured premises, reserving a life estate in the house, is held, in Clinton *v.* Norfolk Mutual F. Ins. Co. (Mass.) 50 L. R. A. 833, not to be a sale of the house which will defeat the insurance on the grantor's life interest, under a clause avoiding the policy if the property be sold.

Joint-Stock Companies.

The power of the state to compel a foreign joint-stock company to furnish information as to its business in the state, although it does not constitute a corporation, but only a partnership engaged in the business of a common carrier, is sustained in State *ex rel.* Railroad & Warehouse Commission *v.* United States Express Co. (Minn.) 50 L. R. A. 667.

Libel.

To publish of a merchant that he has given a mortgage upon his stock of goods, though the same does not appear of record, is held, in Dun *v.* Weintraub (Ga.) 50 L. R. A. 670, not to be an actionable publication without allegations of special damages.

Master and Servant.

A servant who received from his master a trust fund and disbursed it under the master's orders, though with notice of the rights of a third party and of the fact that his master was insolvent, is held, in Hodgson *v.* St. Paul Plow Co. (Minn.) 50 L. R. A. 644, not to be liable for converting the fund, because he acted under his master's orders.

Mines.

The pumping of natural gas, or the use of other artificial devices to increase its flow, from a continuous, connected, and limited

reservoir in the earth, to the damage of other proprietors who have wells supplied from such common reservoir, is held, in Manufacturers' Gas & Oil Co. *v.* Indiana Natural Gas & Oil Co. (Ind.) 50 L. R. A. 768, to constitute an unlawful injury to the common rights of the other proprietors, independently of any statute on the subject.

Mortgages.

An attachment creditor who buys a chattel mortgage on his debtor's property, and thereafter has the property seized under the attachment, is held, in Dix *v.* Smith (Okla.) 50 L. R. A. 714, to waive his lien under the chattel mortgage by so doing.

Municipal Corporations.

A contract by a city with a railway company to maintain for all future time a bridge constructed to restore a public thoroughfare used by the railroad company to its former condition of usefulness is held, in State *ex rel.* St. Paul *v.* Minnesota Transfer R. Co. (Minn.) 50 L. R. A. 656, to be *ultra vires*, contrary to public policy, and void.

A general city ordinance requiring motormen and conductors of street cars to keep a vigilant watch for all persons on foot, and stop the car on the first appearance of danger, is held, in Holwerson *v.* St. Louis & S. R. Co. (Mo.) 50 L. R. A. 850, not to affect the civil liability of the street-railway company to persons injured by failure to comply with the ordinance, where this was not made a part of the railway franchise and the company had never agreed to be bound by it.

Payment.

Payment of a mortgage to a subagent who did not have possession of the mortgage or notes secured by it, or any express authority to make the collection, although he had previously collected interest thereon and started a foreclosure suit for default, is held, in Kohl *v.* Beach (Wis.) 50 L. R. A. 600, not binding on the mortgagee, who held possession of the securities.

Railroads.

The unauthorized act of a mere volunteer or trespasser in raising railroad gates at a crossing to permit a team to pass, without the knowledge of the regular gateman, who had lowered them, and in lowering them before the team had crossed the tracks, is held, in Haines *v.* Atlantic City R. Co. (N. J.) 50 L. R. A. 862, not to render the company liable for an injury thus caused to the driver of the team.

Religious Societies.

The consolidation of several churches of the Methodist Episcopal denomination, effected in accordance with the uniform and universal practice of the denomination, by the presiding bishop at an annual conference, who appoints a pastor for the united societies under a new name, and appoints no pastor for either of the old churches, is held, in Trinity Methodist Episcopal Church *v.* Harris (Conn.) 50 L. R. A. 636, to be binding on the courts, and to give the new society, which has become incorporated, a right to the property held in trust by the old societies.

Street Railways.

The propulsion of street cars by cable power under a charter which gives the right to operate them only by animal power is held, in Chicago General R. Co. *v.* Chicago City R. Co. (Ill.) 50 L. R. A. 734, not to be a ground of liability on the part of the company, in the absence of its negligence, for collision with cars of another company, since the abuse of the franchise is a matter which concerns the public only.

Trademarks.

[See also IMITATIONS.]

The name "Perfection" as the name of a mattress is held, in Kyle *v.* Perfection Mattress Co. (Ala.) 50 L. R. A. 628, to be a valid trademark as a fanciful name.

Vendor and Purchaser.

The destruction by fire of improvements on land for which a contract of sale has been made, before possession was taken by the vendee, is held, in Phinizy *v.* Guernsey (Ga.) 50 L. R. A. 680, to cast the loss on the vendor, and therefore to give him the right to any insurance on the property; and, while the statute denies the vendor any right to specific performance of the contract in such a case, the vendee is allowed such remedy, with such an abatement of the contract price as is just and reasonable.

Voters and Elections.

The decision of a dispute as to which of two persons is the regular party nominee for Congress, when made by the governing authority of the party within the state, such as a state central committee, under authority conferred upon it by the state convention, is held, in Moody v. Trimble (Ky.) 50 L. R. A. 810, to be conclusive upon the courts.

Waters.

The water right of one who appropriates water for the purpose of using it upon nonriparian lands in his possession, but which he does not own, is held, in Smith v. Deniff (Mont.) 50 L. R. A. 737, not to become thereby appurtenant to such lands without a conveyance in writing to the owner of the lands.

The declaration of state ownership of the waters of the state, made by the Wyoming Constitution, is held, in Farm Investment Co. v. Carpenter (Wyo.) 50 L. R. A. 747, not to invade any proprietary right of the United States in such waters, since the state's claim was recognized and approved by the act admitting the state to the Union.

The raising of the level of the waters of a navigable lake, and maintaining them in that condition for more than twenty years, during which the public use and enjoy the lake in its new condition, is held, in Pewaukee v. Savoy (Wis.) 50 L. R. A. 836, to give the state by dedication the title to the lands thus artificially covered, so far as necessary to maintain the condition of the lake.

Wills.

A charge of legacies upon real estate is held, in *Re* Lutz (Mo.) 50 L. R. A. 847, to result where the testator, at the time of making the will and at his death, had no personalty out of which to pay the legacies.

Recent Articles in Law Journals and Reviews.

"The Personal Property Character of a Chattel in Its Relation to Realty."—52 Central Law Journal, 163.

"The Suicide Clause in Life Insurance Contracts."—52 Central Law Journal, 107.

"Maritime Torts Resulting in Death."—52 Central Law Journal, 182.

"Malicious Arrest in Actions of Debt."—21 Canadian Law Times, 89.

"The Probable or the Natural Consequence as the Test of Liability in Negligence."—40 American Law Register, N. S. 148.

"The Code Napoleon."—40 American Law Register, N. S. 127.

"Claims for Arrears of Maintenance."—10 Madras Law Journal, 243.

"The Medico Legal Conflict on Mental Responsibility."—13 Green Bag, 123.

"Sacramental Features of Ancient and Modern Law."—14 Harvard Law Review, 509.

"Mutual Promises as a Consideration for Each Other."—14 Harvard Law Review, 496.

"Sequestration of Witnesses."—14 Harvard Law Review, 475.

"The Law School Extension of the University Principle."—10 Yale Law Journal, 211.

"John Marshall."—10 Yale Law Journal, 171.

"Rights of Abutting Owners as against Telephone and Telegraph Companies."—52 Central Law Journal, 205.

"John Marshall."—7 Western Reserve Law Journal, 31.

"Taxation."—9 American Lawyer, 51.

"Celebration of John Marshall Day by the Courts in Chicago."—33 Chicago Legal News, 207.

"The Career of Aaron Burr—An Episode in American History."—33 Chicago Legal News, 259.

"The Source of Congressional Power over the Territories."—33 Chicago Legal News, 247.

New Books.

"Studies in State Taxation." With Particular Reference to the Southern States. Edited by J. H. Hollander. (Baltimore. Johns Hopkins Press.) 1900.

There are five essays contained in this volume. They were prepared by students of the Johns Hopkins University in connection with a course of graduate instruction upon American commonwealth finance. With the view to supplementing the inadequate material available, certain members of the class undertook to examine and describe the finances of a group of states, each taking those with which he was most familiar. There is no more difficult problem for legislators than that of taxation. It is being constantly forced upon the

crossing to permit a team to pass, without the reasonable.

attention of the people everywhere. But there is no subject on which the adoption of untried theories is more dangerous. The subject is in the highest degree one of practical expediency, to be determined in the main by the results of experience. For that reason these essays furnish material of great value.

"Combined Official New York Digest." Monthly and Annual. (J. B. Lyon Co., Albany, N. Y.) $5 per year. Monthly parts $.50 each. The advance parts are now made monthly instead of weekly.

"Pocket Edition of the Code of Civil Procedure." By Amasa J. Parker, Jr. (Banks & Co., Albany, N. Y.) 1 Vol. $3.50.

"Bates' Ohio Digest." Vol. 3. (W. H. Anderson & Co., Cincinnati, Ohio.) 1 Vol. $5.

"New Edition of the Ohio Statutes." By Clement Bates. (W. H. Anderson & Co.) 2 Vols. $12.

"Burns' Missouri Practice Code." 2d ed. (Bowen-Merrill Co., Indianapolis, Ind.) 2 Vols. $12.

Idaho State Bar Association.

The annual meeting of the State Bar Association of Idaho was held February 4 and 5, 1901, at Boisé, with the following exercises:

Address by R. Z. Johnson, retiring president, on the Proposed Annotated Codes; one by J. H. Richards on Municipal Government; one by George M. Parsons on the Supreme Court of the United States as the Central Power in Our System of Government.

At a public meeting held February 4, James E. Babb delivered an address on John Marshall. Mr. Babb was elected president for the year 1901.

The Humorous Side.

EQUITY SUPPLIES THE PROOF.—The docket of a justice of the peace in Michigan states the following finding: "Plaintiff proved an account of $29.49. Defendant did not prove his set-off by a preponderance of evidence, leaving his rights thereto indefinite, but in equity I have estimated the same at $17.50." On the basis of this equitable estimate of what was not proved, the docket adds: "Judgment in favor of plaintiff for $12.49 principal and $10 costs." Careful subtraction indicates that the justice finally revised his equitable estimate by reducing the set off fifty cents. This shows the elasticity of equity,—especially in justices' courts.

REFRESHING THE JUDGE'S RECOLLECTION.—On a western circuit, where the judge and the state's attorney traveled together, they were holding court in a town where a wave of virtue had attacked the gambling houses. A colored helper in one of these houses was being examined as a witness against his employer. The state's attorney questioned him closely as to the location and number of the gaming tables, with the following result: Answer. "There was jist two tables, boss." Question. "No more than two?" Answer. "No, sah, 'cept in cote time. Then a table 's put in the private room where you all was playing last night."—giving a significant sweep of his hand that included both state's attorney and judge.

HIS CHANCES IN ARKANSAS.—An Arkansas lawyer writes that some years ago a lawyer living in Illinois thought he might venture to open an office in Arkansas, but first wrote to an acquaintance there, telling of his plan, but saying that he was a Republican and wished to know if his life would be safe, and also if there was an opening there for an honest lawyer. His Arkansas correspondent replied that he could come with perfect impunity, as the game laws would protect his life, and that as an honest lawyer he would be absolutely without competition in the state.

GIVING THE PARTICULARS.—In an old law report, 3 Burr. 1692, where it is reported that the lord chief justice of another court came personally into the King's bench to confess *ore tenus* his seal put to a bill of exceptions in the case, the reporter takes pains to add, doubtless for the purpose of showing the exact measure of respect to be paid to the visiting judge in such a case, that "the Lord Chief Justice of the Common Pleas immediately retired without sitting down: And the Lord Chief Justice of this Court attended Him till He was got past the Puisne Judge, but not quite to the door of the Court."

ENGLISH FUN.—An old English report says that a witness testified that in a public house he found "young men skylarking, bonneting and kicking up a rumption; and there was a piece of work. This witness explained that by the term 'bonneting' he meant that the persons were striking each other upon the hat, so as to drive the hat down over the face of the wearer."

"Maritime Torts Resulting in Death."—52 Central Law Journal, 182.

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